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No. 98-227

IN THE SUPREME COURT

OF THE

UNITED STATES

October Term, 1998

K.W. PRUNTY, Warden, et. al., *Petitioner*,

v.

JAITSEN J. SINGH, *Respondent*.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

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INTRODUCTION

Respondent Jaitsen Singh was charged with a double murder, although the state acknowledged that (a) Singh killed neither of the two victims and (b) it had no idea who did. Faced with a case that had been dismissed once for lack of evidence, the prosecutor traded benefits for testimony to a heroin-addicted thief, his key witness at trial, suppressed disclosure of the deal to the defense, and perjured himself when an evidentiary inquiry into the deal was later launched. When the state trial court learned of the prosecutor' misconduct, it granted Singh a new trial, a ruling reversed by the state appellate court, which ignored a controlling decision of this Court, but followed by the Ninth Circuit in granting federal habeas relief.

The State of California now seeks this Court's review of two closely related issues, which it does not and cannot argue merit certiorari under the standard of Supreme Court Rule 10. Those issues – whether the Ninth Circuit used an "incorrect" standard in assessing respondent's Brady claim and whether the decision below conflicts with this Court's Brady jurisprudence – simply do not present "compelling reasons" for review.

To make its case the prosecutor, Dennis Stout, offered the testimony of a career felon and heroin addict, Raymond Copas. Copas claimed that months before the killings Singh had hired him to carry out the killings, though he eventually backed out of the deal. Copas told the jury he was assisting the state out of a sense of moral outrage at the killings. In fact, as every court that has reviewed this case has agreed, Copas was provided a host of benefits in return for his testimony against respondent. Stout and Copas had a deal, though Stout misled the jury on that score in his closing argument (see Appendix A-112) and simply lied, while under oath, when asked about the existence of the deal at the state habeas corpus hearing.

As will appear, the Ninth Circuit unquestionably employed the correct standard – that of

Kyles v. Whitley, 514 U.S. 419 (1995) – the very standard which the state appellate court failed to cite or discuss in overturning the state trial court's order of a new trial. The state's real complaint is not with the standard applied by the Circuit but with the result: on the facts of this case the Court of Appeals found Kyles warranted issuance of the writ of habeas corpus.

Rather than presenting important issues of federal law for this Court's consideration, the state simply seeks further appellate review of issues which turn entirely on the application of well-settled law to facts not subject to dispute. This Court has long declined to review matters which turn solely on an analysis of the particular facts involved. Supreme Court Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or misapplication of a properly stated rule of law."); see also NLRB v. Hendricks County Rural Electric Corp., 454 U.S. 170, 176 n.8; United States v. Johnson, 268 U.S. 220, 227 (1925).

As will appear, and as the Ninth Circuit properly recognized (see Appendix A-112), it was the prosecutor's own view of the exculpatory significance of the evidence withheld from Mr. Singh at his criminal trial that made issuance of the writ in this case a virtual certainty. The Ninth Circuit noted:

> During the evidentiary hearing on Singh's state habeas petition, Stout conceded it might have been the "kiss of death" to the State's case if the jury heard Copas was in essence being rewarded for his testimony with some kind of benefits. With all due respect to the state court of appeal, which felt otherwise, we deem Stout's candid concession to be highly significant. In the adversarial process, the prosecutor, more than neutral jurists, can better perceive the weakness of the state's case. After all, it is the prosecutor who has the duty to determine whether the information is material and whether it should be disclosed. See *Kyles, 514 U.S. at 437.*

(Appendix A-112)

The unanimous opinion in this case, written for a Ninth Circuit panel by an Eighth Circuit judge sitting by designation, applies settled Supreme Court law and does so in a way that indisputably accords with this Court's prior opinions. It raises no new issues nor conflicts with the Brady jurisprudence of other circuits. Certiorari should be denied.

REASONS FOR DENYING THE WRIT

I. THE NINTH CIRCUIT APPLIED THE RIGHT STANDARD

In its lead issue on certiorari, the state suggests this Court should review the case because the Ninth Circuit applied the wrong standard in assessing Singh's Brady claim:

> The appropriate inquiry in assessing materiality is whether the *outcome* of the trial *would* have been different, not whether *one or more members of the jury could have viewed the witness's testimony differently*. The latter inquiry substantially dilutes and weakens the Bagley-Kyles standard of materiality. Plainly the term "would" in the Bagley-Kyles definition of materiality requires a greater showing than the term "could" used by the Ninth Circuit in determining the issue.

(Cert. Petition at 5).

The argument that the Ninth Circuit misunderstood the standard is specious. The Court of Appeal set forth the Bagley materiality standard ("reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667 (1985)), and correctly noted that such a "reasonable probability" is shown "when the Government's evidentiary suppression undermines confidence in the outcome of the trial." (Appendix A-108, citing Bagley and Kyles)(internal quotations omitted).

The Court then went on to conduct its materiality analysis. It started with an appraisal of "the importance of Copas' testimony to the prosecution's case." (Appendix A-108). The court

properly noted that

> [p]olice did not arrest Singh until after Copas approached the police with information about Singh's alleged attempt to hire Copas to murder Grace. The prosecution conceded Singh did not kill Grace and Daphne, and only circumstantial evidence tied Singh to the murders. An important theory of the prosecution's case was that since Singh had once tried to hire Copas to murder Grace, he later hired some other individual or individuals to carry out the murder. *It is likely the jury had to believe Copas' testimony in order to believe the prosecution's theory. For these reasons, Copas was the key witness who linked Singh to the murder-for-hire scheme.*"

(Appendix A-108)(emphasis added).

The court then continued, assessing the nature of the benefits given to Copas, and the impact revelation of those benefits would have had on the juror's assessment of Copas' credibility. The court noted Copas received substantial benefits (see Appendix A-109-110) and concluded that had the benefits been revealed, there exists a reasonable probability that "one or more members of the jury would have viewed Copas' testimony in a different light." (Appendix A-111). The court finally noted (a) revelation of the benefits would have undermined Mr. Stout's powerful closing argument that Singh was the only witness with motive to lie (Appendix A-112) and (b) Mr. Stout, the person in the best position to assess the effect of revelation, testified under oath that had the jury learned Copas was being paid for his testimony, it would have been the "kiss of death" to the state's case. (Appendix A-112).

This analysis is flawless. The court applied this Court's law to the facts before it and concluded as follows:

> In light of the overall record, and the prosecution's knowing and deliberate suppression of the evidence of benefits given to Copas because disclosure of the evidence would have substantially weakened the State's case, the probabilities of a different outcome in Singh's trial, had the evidence been disclosed, preponderate in

favor of Singh rather than the State.

The state simply does not like the outcome here, and so suggests the standard employed was erroneous. It offers no "compelling reason" for review, nor argues the court below "so far departed from the accepted and usual course of judicial proceedings" that this Court should exercise its supervisory power. Supreme Court Rule 10(a). Certiorari is entirely inappropriate.

II. THE NINTH CIRCUIT APPLIED THE MATERIALITY STANDARD PROPERLY

The state's second complaint – again an issue which does not warrant review under Supreme Court Rule 10[1] – is that the Ninth Circuit misapplied Kyles to the facts of this case.[2] (Petition at 7). The state says the Ninth Circuit failed to take into consideration the fact that Copas had already been impeached, that Singh's testimony hurt him, and that the evidence against Singh was otherwise overwhelming.

The state misrepresents the record when it suggests the Ninth Circuit did not take into consideration the trial record. It did so, in a lengthy recounting of the opinion of the magistrate in the District Court. (Appendix A-105). The lower court again acknowledged, in its concluding paragraphs, that the magistrate had cited evidence "implicating Singh in the murders that is independent of Copas' testimony." (Appendix A-114). The lower court unquestionably *considered* the evidence cited by the state. It simply concluded evidence of the testimony-for-benefits deal hidden from the jury was, nevertheless, material, as it plainly was. Absent Copas, the state's case could not have survived a motion for a directed verdict, and the suppressed

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[1] Rule 10 (Court does not review "misapplication of a properly stated rule of law.")

[2] That argument, of course, is logically inconsistent with its prior claim. Either the Ninth Circuit applied a standard other than that stated in Kyles, as California argues in its first issue on certiorari, or it applied Kyles improperly, the state's second argument.

evidence would have been the "kiss of death" to the credibility of this witness crucial to the state's chances for conviction..

Second, even *with* Copas, the state's case against respondent was a stretch. The matter was thrown out by a California municipal court for failing to clear the hurdle of probable cause. When it came to trial, Mr. Stout admitted Singh was far from the scene of the crime. The prosecutor could not tell the jurors who killed Grace and Daphne Singh, nor could he provide direct evidence that respondent had hired anyone to commit the crimes. The case depended (a) on Copas' claim that Singh had once attempted to solicit him to kill his (Singh's) wife and (b) on evidence that Singh was having an affair and that he had purchased, *and then attempted to cancel,* insurance policies. Without Copas, therefore, the state had no case at all. Indeed, Singh was not arrested until after Copas came forward, despite the fact that the evidence upon which the state now relies was already in possession of the police. Copas was the state's case, and the prosecution's deliberate failure to reveal its deal with the witness unquestionably undermines confidence in the verdicts below.

The Ninth Circuit's Brady analysis is correct. Certiorari is unwarranted.

CONCLUSION

For the reasons stated, California's petition for a writ of certiorari should be denied.

Dated: September 22, 1998

Respectfully submitted,

RIORDAN & ROSENTHAL

BY: DENNIS P. RIORDAN

Attorneys for Respondent
JAITSEN SINGH

PROOF OF SERVICE BY MAIL

Re: In Re Jaitsen J. Singh, No. 98-227

I am a citizen of the United States; my business address is 523 Octavia Street, San Francisco, California 94102. I am employed in the City and County of San Francisco, where this mailing occurs; I am over the age of eighteen years and not a party to the within cause. I served

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS; MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS.

on the following person(s) on the date set forth below, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office mail box at San Francisco, California, addressed as follows:

Sara Gros-Cloren, Esq.
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I certify or declare under penalty of perjury that the foregoing is true and correct. Executed on September 22, 1998, at San Francisco, California.

Florian Carlos